No. 10523

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

W. S. D. SMITH,
Appellant.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT W. S. D. SMITH

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In an endeavor to answer the brief of the appellant, we believe it is fair to state that the appellee relies solely on a fine distinction of the meaning of Title 28, U.S.C.A. 791 to defend the judgment. It asserts the Congress did not intend to include a fine among the limited actions, but if it did, then because the fine was reduced to judgment, by this procedure it was *ipso facto* removed from the bar of the statute. We again reassert, "a fine is always a penalty," and the fact that it is now in the form of a judgment does not alter its character. None of the cases cited by appellee construe the U. S. Limitation Statute and the points made in the brief refer to civil cases

brought by the sovereign involving only limitation statutes of the several states and cases involving fine, faith, and credit provisions of the Constitution. We again assert that this case is governed by Section 791 and is barred.

"A fine reduced to judgment is still a penalty."

The brief of appellee dismissed the appellant's argument on this point with an unsupported statement that because the pecuniary punishment imposed, was reduced to a judgment of fine, its status was changed and asserts because "judgment" is not specifically mentioned the statute is not applicable. It has been said that "a judgment is the conclusion of law upon the matters contained in the record or the application of the law to the pleadings and to the facts as they appear from the evidence in the case as found by court or jury. * * *" 30 Am. Jur. p. 821. The facts submitted to the jury, as shown by the records of this court, indicate the appellant violated the law and was convicted by the jury and adjudged to pay a pecuniary penalty. The effect of a judgment on such evidence is to merge therein the cause of action on which it is brought. It does not enlarge the cause of action or change its character and its only effect is to make the cause of action *res adjudicata* between the parties and constitutes a bar to another action upon the same claim or demand. The record of appellate court shows that appellant Smith's case was affirmed on the 15th day of March, 1926, and the court takes judicial notice of this fact. See also (Tr. 24, 27).

The court will always look behind a judgment and will grant or deny relief according to the nature of the original cause of action as it did in *Louisiana v. New Orleans*, 109 U.S. 285, 27 L. ed. 936, and *Westmore v. Markoe*, 196 U.S. 69, 49 L. ed. 390.

In another case the court decided that an action is not changed by recovering judgment thereon but the court will search the record to ascertain if the claim is for a penalty and in refusing to enforce the penalty stated:

> "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. *If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.* Whart, Confl. L. §833; Westlake, Internat. L. 1st ed. §388; Piggott, Foreign Judg. 209, 210." (Italics ours)
>
> *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 32 L. ed. 239.

> "Liability for the penalty does not arise in contract but is laid in invitum as a disciplinary measure. Nor does the judgment determining the extent of guilt and declaring sentence change the liability for penalty to one for debt. *Chase v. Curtis*, 113 U.S. 452, 463, 464, 28 L. ed. 1038, 1042, 5 S. Ct. 554; *Boynton v. Ball*, 121

U.S. 457, 465, 466, 30 L. ed. 985, 986, 7 S. Ct. 981."

McCollum v. Hamilton Nat. Bank, 303 U.S. 245, 82 L. ed. 819.

This is stated in another way in the following case:

"It is well settled that however strong the reason may be, a court cannot engraft on a statute of limitations an exception which the statute itself does not make."

U. S. v. Mulland, 13 Int. Rev. Rec. 27.

See also:

In re Landsburg, 11 Int. Rev. Rec. 150;

U. S. v. Wright, 13 Int. Rev. Rec. 35;

U. S. v. Shorey, 9 Int. Rev. Rec. 202;

The Washington Supreme Court in discussing the definition of a fine and costs as a community obligation states:

"A fine is a sum of money exacted, as a pecuniary punishment, from a person guilty of an offense, while costs are but statutory allowances to a party for his expenses incurred in an action. The former is, in its nature at least, a penalty, while the latter approaches more nearly a civil debt."

Bergman v. State of Washington, 187 Wash. 622, 60 P.(2d) 699, 106 A.L.R. 1007.

The Attorney General of the United States has held that fines are within the limitation of the act.

14 Opinion of Atty. Gen'l. 81.

What did the judgment do to the original cause of action against the appellant? Nothing more than adjudicate the existence of the liability in question and subject the party to the penalty therefor. It could

not and did not alter the appellant's offense, it adjudicated it to be an indisputable fact. We do not believe that if the government were now attempting to collect the penalty in an initial proceeding, it would be urged by its counsel that U. S. statute did not apply to the action because it is apparent that it would be more than five years from the time "when the penalty or forfeiture occurred." Could it successfully be urged that it was not a "pecuniary penalty" because the exact word "fine" had not been used? We do not think so and the appellee concedes the weakness of its position when it attempts to use the case of *In re Sanborn*, 52 Fed. 583, and *United States v. Younger*, 92 Fed. 672, as authorites. One considered the question whether a fine is a debt within the constitutional provision abolishing imprisonment for debt and the other involves the issuance of a bench warrant in a civil action. No attempt has been made to distinguish the penalty definitions in the cases cited by appellant on pages 11, 12, of his brief but they are dismissed from consideration by the statement, "if Congress had intended to include a fine imposed upon the defendant for the commission of a criminal act, Congress would have said so." Who can say that the Congress did not consider, when it passed the legislation, that the generic term "penalty" included both civil and criminal proceedings and that "a fine is always a penalty, although a penalty is not always a fine." It is the court's province to construe the statute in light of the general definition and not place upon it a particular construction which would

cause an injustice. This is well expressed in a case relied on by the appellee wherein it is said:

> "The paramount duty of the court in construing a statute is to ascertain and give effect to the legislative intent. The duty has been well expressed by Judge John F. Philips of this circuit in *Rigney v. Plaster* (C.C.) 88 F. 686, 689: 'It is among the recognized canons of interpretation of statutes that the intention of a legislative act is often to be gathered from a view of every part of the statute, and the true intention should always prevail over the literal sense of the terms employed. "*When the expression of a statute is special or particular, but the reason is general, the expression should be deemed general; and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradition, and absurdity.*" 1 Kent. Comm. p. 462. Again, a thing within the intention of the legislature in framing a statute is often as much within the statute as if it were within the letter. *Riddick v. Walsh.* 15 Mo. 519; *Schultz v.* (*Pacific*) *Railroad Co.*, 36 Mo. 13; *State* (*ex rel. Missouri Mut. Life Ins. Co.*) *v. King*, 44 Mo. 283; *In re Bomino's Estate*, 83 Mo. 441'." (Italics ours)
>
> *Grier v. Kennan*, 64 F.(2d) 605 at p. 607.

May we ask, why should not the term "penalty" control the litigation when the intent of Congress is so apparent and a special or particular or strained construction would lead to palpable injustice? If we were seeking a strained statutory construction, we might well urge that 18 U.S.C.A., 569, set forth at page 7 of appellee's brief limits the government to a

single proceeding and execution on the judgment and that no right exists for the government to maintain this action.

In referring to a criminal case, Judge Cardozo states:

> "The payment of a fine imposed by a court of the United States in a criminal proceedings may be enforced by execution against the property in like manner as in civil cases. Rev. Stat. Sec. 1041, U.S.C.A., Sec. 569. In the discretion of the court, the judgment may direct also that the defendant shall be imprisoned until the fine is paid (citing cases). If the direction is omitted, the remedy by execution is exclusive."
>
> *Hill v. U. S.*, 298 U.S. 460, 80 L. ed. 1283.
>
> *U. S. v. Smith*, 28 F. Supp. 726.

Further it may be urged that appellants' liability in this case might be considered a second trial for the same offense.

The *La Franca* case cited in our opening brief held that a conviction under the National Prohibition Act barred a civil action for the collection of liquor taxes. The court said:

> "Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?"

The court in holding that it did not, quoted from another case, said:

> "Admitting that the penalty may be recovered

in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. * * *

"To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

U. S. v. La Franca, 282 U.S. 568, 75 L. ed. 551.

This observation might well be said of the government's suggestion that a judgment is not a penalty.

On the same day, Judge Sutherland, in passing upon an *in rem* proceeding for forfeiture, stated:

"In *United States v. La Franca*, 282 U.S. 568, *ante*, 551, 51 S. Ct. 278, decided this day, we hold that, under §5 of the Willis-Campbell Act (November 23, 1921, 42 Stat. at L. 223, chap. 134, U.S.C. title 27, §3), a civil action to recover taxes, which in fact are penalties, is punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transactions. This, however, is not that case, but a proceeding *in rem* to forfeit property used in committing an offense."

U. S. v. Various Items, 282 U.S. 577, 75 L. ed. 558.

The following citation emphasizes the point:

"This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again

litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in the unanimous opinion of the judges in the case of *Rex v. Duchess of Kingston*, 20 Howell, St. Tr. 355, 538, and which were formulated thus: the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea at bar, or as evidence conclusive, between the same parties, upon the same matter directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose. In the present case, the court is the same court and had jurisdiction; and the judgment was directly on the point now involved and between the same parties."

Coffey v. U. S., 116 U.S. 436, 29 L. ed. 684, p. 687.

The Appellant's Other Authorities

We have discussed some of the cases cited by the appellee. We will discuss others and show that they are not applicable.

The *Kausch* case cannot be authority for the appellee's contention, as it merely interpreted the Volstead Act and decided that the Volstead Act provides, "A fine, a tax and a penalty as punishments have one and the same effect."

Kausch v. Moore, 268 Fed. 671.

The *Luther* case is not in point, as it involved a proceeding on a bail bond, and the court held that

this was an action on a contract, and the five year limitation did not apply, stating with reference to the statute, "on its face, this statute applies to a statutory penalty or forfeiure."

U. S. v. Luther, 13 F. Supp. 126.

The *Stockwell* case is, in our opinion, an authority favorable to the appellant rather than the appellee, stating:

> "Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained."
>
> *Stockwell v. U. S.,* 80 U.S. 162, 20 L. ed. 491.

The *Pratt* case cited by the appellee has a pertinent observation:

> "Section 1042 was enacted for the relief of poor convicts under such circumstances and the entire section deals with the subject of imprisonment and relief from imprisonment, and has no reference to a discharge of the pecuniary obligations to the government. I therefore interpret the word 'discharge' to refer to 'his discharge from imprisonment,' and not from any *pecuniary obligations* imposed." (Italics ours)
>
> *United States v. Pratt,* 23 F.(2d) 333 at 334.

The statute we rely on specifically restricts actions

on penalties "pecuniary or otherwise," so the case cannot be considered as a precedent for the appellee.

We are unable to see the aptness of the *Wampler* case to the one at bar. It passes on the legality of a warrant of commitment made by Clerk of Court which departs in substance from the judgment back of it and decrees it to be void.

The *Houston* and *Godkin* cases involved questions of patent suits and suits on bonds and are not authorities pertinent to this litigation.

We have already discussed the *Schodde* case and the *McCutcheon* case. We again assert that they are not authorities for the government's position because they did not involve the U. S. limitation statute and therefore are not controlling on the court.

We again submit that this is an action brought by the United States to recover a penalty which has been reduced to a judgment, but even though reduced to a judgment, it is still a penalty and the five year statute is applicable. To hold otherwise, would visit a palpable injustice upon the appellant and leave many of the citizens who have rehabilitated themselves after serving a prison sentence continuously subject to financial harassment during their lifetime. We do not think the Congress intended this, and if it had so intended, it would have put in the words of exception "any penalties or forfeiture, pecuniary or otherwise except fines." It did not do so, so the statute should be applied to the fine and the judgment.

We respectfully submit that the judgment should be reversed and the cause dismissed.

Respectfully submitted,

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